

2:15 pm, Dec 10, 2019

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
UNITED STATES OF AMERICA, : 13-cr-00607-JFB
:
- versus - : U.S. Courthouse
: Central Islip, New York
:
KENNER, et al., : December 6, 2019
Defendants : 2:30 PM
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VISITING JUDGE JOSEPH F. BIANCO

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1 THE COURT: Criminal Cause for a Status
2 Conference in 13-cr-607, United States of America v.
3 Phillip Kenner and Tommy Constantine.

4 Counsel, please state your appearances for the
5 record.

6 MS. KOMATIREDDY: Good afternoon, your Honor.

7 Saritha Komatireddy, for the United States. I
8 am joined by AUSAs Matthew Haggans, Diane Leonardo, and
9 Madeline O'Connor.

10 THE COURT: Okay. Good afternoon all of you.

11 MR. HAGGANS: Good afternoon.

12 MR. TALKIN: Good afternoon, your Honor.

13 Sam Talkin and Noam Greenspan for Mr.
14 Constantine, who is seated between us.

15 THE COURT: Yes. Good afternoon to both of
16 you. Good afternoon, Mr. Constantine.

17 DEFENDANT CONSTANTINE: Good afternoon, your
18 Honor.

19 DEFENDANT KENNER: Good afternoon, your Honor.

20 Phil Kenner, pro se with standby counsel, Matt
21 Brissenden.

22 THE COURT: Good afternoon, Mr. Kenner.

23 MR. BRISSENDEN: Good afternoon, your Honor.

24 THE COURT: And good afternoon, Mr. Brissenden.

25 And I apologize, we had an unexpected conference in a

Proceedings

1 criminal case that I had to address. So I apologize for
2 keeping you all waiting but obviously there are a number
3 of different issues that I think are either unresolved or
4 anew since the last time we met, so I have sort of an
5 agenda that I want to go through today, and then I'll
6 obviously address any other open issues that we haven't
7 covered, all right?

8 So I wanted to start with the forfeiture issue.
9 So I know from the back and forth, obviously I've
10 received and reviewed all the letters since our last
11 conference, from all the individuals and entities who are
12 involved in the forfeiture issue.

13 So let me just ask the government to update the
14 Court. Did the government go down for the appraisal?
15 Did that happen?

16 MS. O'CONNOR: Yes, your Honor, about two weeks
17 ago the government went down. We met with Mr. Jowdy, the
18 DCSL employees, and Mr. Souther. DCSL has been
19 cooperative in providing documents, and the appraisal is
20 underway.

21 THE COURT: All right. What's the estimate in
22 terms of when the appraisal will be complete?

23 MS. O'CONNOR: Your Honor, hopefully towards
24 the end of January. There are certainly no guarantees.
25 There might be additional documentation needed but that's

Proceedings

1 the government's hope.

2 THE COURT: All right. I guess we'll come back
3 to that. Mr. Wolinsky submitted, you probably saw it, a
4 letter in the last couple of days, and the one of the
5 things -- I think I know the government's answer to this
6 but one of the things he's raising is that the outcome of
7 that appraisal may affect the government's decision
8 making as to whether or not it makes sense to try to
9 forfeit the resort or not. So do you want to respond to
10 that?

11 MS. O'CONNOR: Yes, your Honor. The government
12 -- the law doesn't require the government to obtain an
13 appraisal to demonstrate a certain amount of equity in
14 property. The government's only burden is to demonstrate
15 the requisite nexus between the property and the crimes
16 of conviction.

17 Although the appraisal might assist the
18 government in determining whether to continue the process
19 after the property is ordered forfeitable, in the event
20 it's ordered forfeitable, waiting for an appraisal
21 result, there's no need to do that. It shouldn't delay
22 the entry of the POF, and sentencing of the defendants.

23 Worst case scenario, the government always has
24 the ability to move the Court to vacate the POF as to the
25 resort, if necessary.

Proceedings

1 THE COURT: All right. Maybe I will come back
2 to that as well, but I had a couple of other questions.
3 One of the things that came up -- I mean, I know the
4 government has obviously made a lot of modifications to
5 the proposed order, the preliminary order, based upon the
6 concerns raised and the Court's discussions regarding
7 that.

8 The one that I saw in the letters that I guess
9 I am not sure, and again, I understand all these things
10 don't have to be under the law, but were obviously trying
11 to address any concerns that people have regarding what
12 the impact would be, and what limitations there might be
13 in the future based upon the preliminary order.

14 One issue was making clear that it's possible
15 that the government could decide that selling the equity
16 in the property, as opposed to the resort itself might be
17 more advantageous and putting some language in there to
18 make clear that that -- not that that was going to be a
19 requirement, but that that was a possibility, I think.
20 If my understanding of the letters are correct, they
21 thought that would be helpful in avoiding any limitations
22 on the options available to the government in the future,
23 or any adverse consequences.

24 So is there -- as long as it's not binding the
25 government in anyway, but it's just put in there to make

Proceedings

1 clear that that's a possibility, does that create any
2 issues?

3 MS. O'CONNOR: Your Honor, limiting the
4 government's forfeiture of the equity interest is
5 problematic, due to the way THE PROPERTY IS OWNED. The
6 property is owned right now by the trust, not by the
7 entities. So the first place beneficiary is the bank,
8 and then the second place beneficiaries would be all the
9 entities.

10 So by limiting ourselves to the forfeiture of
11 the entities interest, the bank could turn around and
12 foreclosure, and then there would be no forfeiture. So
13 that, first and foremost, is a very clear issue for us.

14 THE COURT: Yeah, again, I didn't -- and we
15 have some of the attorneys here, I didn't understand them
16 to saying that I was going to order that it be limited to
17 the equity interest but they seem to believe that this is
18 a scenario where it may be in everybody's interest,
19 including the government's interest, to do it that way.

20 So, as long as it's not indicating that it has
21 to be done that way, but maybe -- does someone want to
22 come up and explain that to make sure I am not
23 misunderstanding that?

24 MR. KOSTOLAMPROS: Thank you, your Honor.

25 George Kostolampros of Venable representing

Proceedings

1 Danske Bank.

2 THE COURT: Yes.

3 MR. KOSTOLAMPROS: You're right, your Honor.

4 We're not asking the Court to limit the government's
5 ability. We want to just set forth that this is
6 something that is an option that can be taken by the
7 government, and frankly, could be made in a motion by
8 Danske if it wanted to move for an interlocutory sale,
9 that it wasn't limited to just a forfeiture of the resort
10 property, and a sale of the resort property, but could
11 offer the Court look, the way that we think the best way
12 to proceed is through the equity interest. So we want
13 to --

14 THE COURT: I guess they're suggesting that
15 there's going to be -- maybe they think there's going to
16 be no scenario by which that would be the most
17 advantageous -- maybe for the bank it might be but
18 they're saying there's no scenario -- I don't know
19 whether they're saying that but --

20 MR. KOSTOLAMPROS: I don't know that they are,
21 your Honor. I think this is a fluid situation, and
22 frankly, you know, we've spoken with experts, JLL is one
23 of which, who has told us there would be more value in
24 selling the equity.

25 The government's right, the property right now

Proceedings

1 sits and is owned by the trust, but you know ultimately
2 what the -- if this was an agreed to interlocutory sale,
3 the Danske Bank would be agreeing to that sale, and then
4 would make every effort that the trust would then sell
5 that or would execute on however that -- the sales moved
6 forward.

7 So ultimately, what we wanted here was not to
8 be limited by an order that could be read to say look,
9 the only thing that could be sold ultimately is the
10 resort property and not the equity.

11 And again, our understanding is that there
12 would be more value ultimately if the resort were seized
13 and there was ultimately a sale, that that sale would be
14 of a going concern entity, as opposed to the resort
15 property itself, and not the business.

16 And there are a number of reasons for that
17 because there are contracts that come along with that,
18 employees -- all of those agreements.

19 THE COURT: All right.

20 MS. O'CONNOR: Your Honor, there's another
21 primary issue with limiting the forfeit or forfeiting the
22 equity interest. At present, the entities have
23 contingent future interests in the property, not present
24 interest in the real property. So forfeiting these
25 equity interests will not give the government present

Proceedings

1 title which would be needed to forfeit the real property.

2 THE COURT: Well, maybe it's just a matter of
3 the wording though, if the Court were to -- if it would
4 be a preliminary order of forfeiture of the property, but
5 have language in there that suggests the parties in
6 connection with trying to resolve the forfeiture issue
7 could propose to the Court an alternative of, you know,
8 the equity interest.

9 So it wouldn't be that the forfeiture -- the
10 preliminary forfeiture itself would only be for the
11 equity interest. It would be of the resort itself with
12 making it clear that one of the options down the line
13 would be interlocutory -- potentially interlocutory sale,
14 right? Is that --

15 MR. KOSTOLAMPROS: That's right, your Honor.

16 THE COURT: Because what they're saying is that
17 it creates problems to make the order -- the preliminary
18 order only relate to the equity interest but that's not
19 what you're suggesting.

20 MR. KOSTOLAMPROS: That's not what we're
21 saying.

22 THE COURT: All right.

23 MR. KOSTOLAMPROS: I mean frankly, I mean it
24 could be in a footnote --

25 THE COURT: Right.

Proceedings

1 MR. KOSTOLAMPROS: -- that it's not limited,
2 and it could very well be the equity interest or the
3 resort property itself.

4 THE COURT: All right. Again, I think the
5 government understands -- we've been through this so many
6 times now that my view of this is that to the extent that
7 these types of accommodations can be made without
8 prejudicing the government's, you know, rights in anyway
9 in connection with the order, that we try to have
10 something in there that accommodates that.

11 So even if it's in a footnote, if it -- you
12 know, the government, I think understands what they're
13 hoping to do. You can create the language to make it so
14 that it doesn't interfere with anything you may want to
15 do down the line, or if you want them to propose it, I'll
16 ask them to propose it but I don't know, would you want
17 them to propose the language?

18 MS. O'CONNOR: Yes, your Honor.

19 THE COURT: All right.

20 MR. KOSTOLAMPROS: Okay, we will.

21 THE COURT: So could you do that?

22 MR. KOSTOLAMPROS: Yeah.

23 THE COURT: All right. While I have you
24 standing there, are there any other issues?

25 MR. KOSTOLAMPROS: There are two issues that

Proceedings

1 we've raised, your Honor. One is assuming the Court
2 issues a preliminary order of forfeiture that includes a
3 resort property, including the language we just
4 discussed, we would like to see an expedited process
5 where we would move forward with what's next to do on the
6 property itself. Is there going to be an interlocutory
7 sale?

8 You've raised the issue that Mr. Wolinsky has
9 raised as to whether the government should hold off, get
10 its appraisal first.

11 Now we agree with Mr. Wolinsky, if the
12 government was willing to do that, we think why not? At
13 the end of the day, if ultimately the government would
14 walk away and say look, there is no equity value here,
15 and ultimately it's going to enure to just causing more
16 victims here ultimately, if there's no value that would
17 find its way back to the victims here, then why not hold
18 off?

19 The government has said that they expect this
20 to be done by January. I understand that the Court has
21 its timing, and perhaps they could fit in this timing. I
22 am not sure when the Court is expecting to -- for
23 sentencing in this matter. So if it could be aligned
24 with sentencing, and we could hold off on a preliminary
25 order of forfeiture until then, then why not do that? I

Proceedings

1 mean it's not limiting the government in any way.

2 THE COURT: Do you want to respond to that?

3 MS. O'CONNOR: Your Honor, the government last
4 court appearance agreed to file the revised preliminary
5 order with two specific changes. We did so. Your Honor
6 recognized that there wasn't anything more that your
7 Honor could think of, that the government could do.

8 Even though the third-parties were present at
9 the last court conference, were heard at length, you had
10 no other suggestions for how the government should revise
11 the POF that the Court deemed appropriate, the third
12 parties nevertheless filed letters immediately after the
13 government filed the agreed upon revised proposed order
14 objecting to the language.

15 We were reluctant to file the revised order
16 because we were concerned that the third-party complaints
17 would continue, and they have. This is clear that this
18 is a cycle of the government filing revised orders,
19 followed by complaints that will continue in perpetuity
20 until the POF is ultimately entered.

21 So at this point, your Honor, the government's
22 position is that the POF is appropriate. It protects the
23 government's interest in the property. Nothing more is
24 required. And --

25 THE COURT: Well, why is -- and again, I am not

Proceedings

1 going to -- we have to deal with the sentencing issues,
2 as well. So this is not going to hold up to the extent
3 that the Court is going to proceed with sentencing.
4 Forfeiture would have to go along with it, but -- and my
5 plan is to try to proceed with the sentencing as soon as
6 possible, but I guess I just want to understand if --
7 there's two things going on here. One is if it does turn
8 out to be less than, what is it \$160 million or --

9 MR. KOSTOLAMPROS: \$180 million, your Honor.

10 THE COURT: \$180 million, I mean it seems like
11 there is at least a possibility the government would say
12 this is not worth it, right?

13 MS. O'CONNOR: There --

14 THE COURT: Or am I misunderstanding that?

15 MS. O'CONNOR: If the government --

16 THE COURT: Suppose it comes out to be a \$160
17 million, you know, appraisal?

18 MS. O'CONNOR: If that occurs, and the
19 government exercises its discretion not to pursue the
20 forfeiture, it can simply move the Court to vacate that
21 aspect of the POF that pertains to the forfeiture of the
22 resort.

23 So there's no reason not to enter the POF, and
24 the government can later pursue a modification of the
25 POF. So to hold up any sentencing for it, is

Proceedings

1 unnecessary.

2 THE COURT: I'm not holding off the sentencing.
3 I'm saying to the extent that -- why wouldn't I just wait
4 at a minimum until what the actual sentencing date or
5 close to it, just to see if the government can get the
6 appraisal done, maybe sooner than January 30th, and to
7 see what the results of that is.

8 And I did want to speak about the restitution
9 issue, as well, because I'm not sure I completely
10 understand why the appraisal is not relevant for purposes
11 of either the loss amount or restitution. I'm trying to
12 process that. I did read the government's sentencing
13 memo, but I am not sure I completely understand that.

14 But let me -- I guess I should just say it the
15 reverse way. If the Court didn't enter a preliminary
16 order next week but it was 30 days from now, what's the
17 harm to the government at this point?

18 MS. O'CONNOR: Your Honor, there might not be
19 any harm to the government, but there's also no harm in
20 entering the order.

21 THE COURT: Well, the --

22 MS. O'CONNOR: The government then pursue --

23 THE COURT: I know, but you know, you've sat
24 through enough of these conferences, they've been telling
25 me for months that the preliminary order itself is going

Proceedings

1 to have harm, which is some of the reasons why we've been
2 going through all these iterations of the preliminary
3 order.

4 So I know the government doesn't believe
5 anything is going to happen when I enter that order but I
6 am balancing what they're telling me they are concerned
7 is going to happen with any prejudice that the government
8 by waiting a couple of weeks.

9 But I understand the issue. Let me think about
10 it some more, okay?

11 MR. KOSTOLAMPROS: Okay.

12 THE COURT: All right. Thank you.

13 MR. KOSTOLAMPROS: Thank you, your Honor. And
14 the last issue that we had was the way that it reads now,
15 the preliminary -- the proposed preliminary order of
16 forfeiture, still includes in the carve-out employees
17 current, or ex-employees of Danske Bank that may have
18 purchased an interest in the resort property.

19 THE COURT: Yeah, I saw that. You know, when
20 they had particular names in there, obviously that's a
21 bigger issue.

22 MR. KOSTOLAMPROS: Right.

23 THE COURT: I'm not sure just having that as a
24 potential carve-out in an abundance of caution, you know,
25 I am not sure I feel as strongly about that being some

Proceedings

1 kind of unfair --

2 MR. KOSTOLAMPROS: The only thing I would ask
3 for the Court to consider is practically though, what are
4 the limitations on that, including all employees without
5 any time frame within there? I mean --

6 THE COURT: I know, but how many employees have
7 some interest in the resort?

8 MR. KOSTOLAMPROS: I am not aware of any --

9 THE COURT: Okay, so --

10 MR. KOSTOLAMPROS: -- but then again, there
11 could be one, right, that was an ex-employee --

12 THE COURT: All right. So they would have to
13 show --

14 MR. KOSTOLAMPROS: -- they or their family
15 member --

16 THE COURT: They'd have to show, you know,
17 documentation on how they acquired it, I guess, right?
18 Wouldn't that be the result? I mean, I don't --

19 MR. KOSTOLAMPROS: Right.

20 THE COURT: Exactly.

21 MR. KOSTOLAMPROS: And ultimately, too, getting
22 those individuals notice, and you know that's sort of --
23 I've been wondering, is practically how do you get those
24 individuals notices? We don't know which ones but
25 potentially, there could be family members, relations

Proceedings

1 that were ex-employees, that could share an interest in
2 that property, and without any showing that there are any
3 Danske employees --

4 THE COURT: Yeah, well I assume --

5 MR. KOSTOLAMPROS: -- that have an interest on
6 this property.

7 THE COURT: -- I don't know, does the
8 government have an answer to that, how you would identify
9 those people, I guess?

10 MS. O'CONNOR: Your Honor, we would seek
11 Danske's assistance in identifying any employees based
12 upon the names of owners, but that would be our burden,
13 but we would point out, this would be something that all
14 interest parties are ordinarily required to do. They
15 have this legal obligation to present proof of their
16 interest.

17 THE COURT: Right. Okay. I am not going to --
18 I don't think it's necessary to change that, okay?

19 MR. KOSTOLAMPROS: Okay.

20 THE COURT: All right.

21 MR. KOSTOLAMPROS: Thank you, your Honor.

22 THE COURT: Thank you. All right. So Mr.
23 Kenner, you have your hand up there. Is there something
24 you want to say?

25 DEFENDANT KENNER: Yeah, your Honor, I just

Proceedings

1 wanted to add in the context of being concerned about
2 making sure people are made whole for whatever forfeiture
3 issues need to be addressed by the Court, your Honor back
4 during the forfeiture hearing asked why couldn't the
5 Court just determine what money from went from Hawaii to
6 the entity that was unauthorized, in order that amount or
7 percentage forfeited.

8 In the context of the government presenting
9 their forfeiture case, they presented Government
10 Forfeiture 36 which traced \$350,000 to the Cabo resort,
11 and nothing else.

12 That would effectively be the money. There's a
13 side issue with that that Mr. Jowdy already settled --

14 THE COURT: Say that -- what number again? Say
15 that again.

16 DEFENDANT KENNER: Government Forfeiture 36.

17 THE COURT: Right.

18 DEFENDANT KENNER: I believe it was the May
19 4th, 2005 wire transfer for \$350,000. Mr. Jowdy already
20 did a side settlement back in 2008 for that money.

21 But ultimately, you also had Mr. Wayne gave
22 testimony during the trial, during the forfeiture
23 hearing, where he confirmed that 100 percent of the money
24 that purchased the 39 percent interest in Baja Ventures
25 came from my two European partners, Mr. Stumpel and Mr.

Proceedings

1 Lehtinen.

2 Notwithstanding those issues, and the recent
3 ruling I think that the Court's aware of in Shkreli,
4 where they -- with a 18-cr-819 at the appellate level
5 quoted, "Criminal forfeiture focuses on the disgorgement
6 by a defendant of his ill-gotten gains, Contorinis at 692
7 F.3d at 146 in U.S. v. Torres, 703 F.3d 194, at 203",
8 both a Second Circuit, where forfeiture is deem based --
9 not based on the losses to victims. And that's in the
10 memo at page 6 and 7.

11 The point behind it is when the government
12 traced this money, and they're trying to separate ill-
13 gotten gains from an unauthorized destination, I know
14 that in the papers that I've read on the preliminary
15 order of forfeiture, Danske Bank has made a very -- a
16 very strong offer to put up some money, and take out any
17 of the -- the victims that are traceable to the Cabo San
18 Lucas project, in order to avoid any further
19 consternation with the CSL property members, five of
20 which were in this case. I think seven, or eight, or
21 nine of them were not.

22 And then keep the other 6,000 timeshare and
23 homeowners, and Mr. Wolinsky's Diamante Doce, LLC out of
24 any of this conflict, and because it's a \$350,000 tracing
25 that goes only to Mr. Jowdy's LLC, Mr. Jowdy settled that

Proceedings

1 with Mr. Nolan (ph.) back in 2008, already for those
2 funds. Perhaps Danske Bank can make an offer just to
3 take out whatever that nominal money is that goes to Cabo
4 San Lucas, because there really has been no other nexus
5 proven. That's what the government proved during their
6 forfeiture case.

7 THE COURT: Yes, I guess I am a little confused
8 by the \$350,000 reference. Does the government want to
9 respond to that? I don't --

10 DEFENDANT KENNER: It's in their G-36 that they
11 submitted during the forfeiture hearing.

12 DEFENDANT KENNER: Right.

13 MS. O'CONNOR: Your Honor, I am not entirely
14 sure what he's -- Mr. Kenner's referring to. If we're
15 talking about the Lehtinen and Stumpel money going -- the
16 purchase of Baja Ventures, if that's what he is
17 referring, or if the question is the wire transfers and
18 money to Cabo going to Mr. Jowdy. So I am not really
19 sure what you would like me to respond to.

20 THE COURT: I thought he was referring to the
21 ones that went to Mr. JOWdy, and he was saying he was
22 limited to \$350,000. Is that what you're --

23 DEFENDANT KENNER: Yes, sir, your Honor. On
24 Government 36 where they traced for the forfeiture
25 hearings back in March of 2016, they traced the money

Proceedings

1 that went to the Cabo San Lucas project that Mr. Jowdy
2 applied to the application of any of the LLCs. There was
3 a little over \$6 million traced to the LLC --

4 THE COURT: Right.

5 DEFENDANT KENNER: -- excuse me, to the
6 purchase, and only \$350,000 comes from one of the victims
7 in the case, and that is Mr. Nolan. And as a result, I
8 think with some forethought, Mr. Jowdy settled with Mr.
9 Nolan for that money, and other business transactions
10 back in 2008.

11 Mr. Juneau actually made reference to those
12 settlements during th trial here. I can get to the
13 transcript number if you would like, that Mr. -- that
14 Juneau actually referenced it. It will just take me a --

15 MS. O'CONNOR: And your Honor, if Mr. Kenner is
16 seeking to have that money credited towards the
17 forfeiture, the forfeiture the government is seeking is
18 gross proceeds. So the money the government traced would
19 be the entire amount of forfeitable property, which is a
20 different issue from restitution or loss amount.

21 THE COURT: All right. I will go back and look
22 at it, Mr. Kenner, okay? I don't want to get too side-
23 tracked from the issues but I am obviously very focused
24 on the forfeiture part of the case, and resolving it
25 completely.

Proceedings

1 One of the things I did, and Mr. Talkin is
2 there anything you want to add, because I did -- I had an
3 issue -- no?

4 MR. TALKIN: Not on this issue, no.

5 THE COURT: Well, I just have an issue -- it's
6 been appraised previously by -- it may have been both Mr.
7 Talkin and prior counsel, which is this -- the money
8 judgment that the government is seeking which is \$36
9 million against both defendants, Mr. Kenner obviously has
10 his objections to that because much of it relates to, you
11 know, money that the government is not claiming was the -
12 - or is not trying to prove was part of the fraud, and
13 that the investors knew the money was going to, for
14 example, Los Frailes, and del Mar. So that's Mr.
15 Kenner's issue.

16 But Mr. Constantine has another issue that Mr.
17 Kenner doesn't have, which is Mr. Constantine's argument
18 is that none of that was even reasonably foreseeable to
19 him, that he wasn't involved in del Mar, he wasn't
20 involved in Frailes, and the government -- I went back
21 and sort of looked at the forfeiture submissions, what
22 the government's response to that was, and I think the
23 government just said oh, it's -- you know, he was in the
24 conspiracy but I think the government realizes that there
25 has to be a reasonable foreseeability, even in forfeiture

Proceedings

1 there has to be some reasonable foreseeability by a co-
2 conspirator of what's going on.

3 So it's not clear to me that Mr. Constantine
4 would have any knowledge of what was going on with
5 respect to much of what the government is including in
6 the money judgment part of the case. So does the
7 government want to address that? What evidence is there
8 that Mr. Constantine had any knowledge of what was going
9 on with Mr. Kenner taking money for, you know, \$10
10 million for del Mar. How would Mr. Constantine know
11 about that?

12 MS. O'CONNOR: Your Honor, could the government
13 have the opportunity to address that in writing?

14 THE COURT: Yes, that's fine. You know,
15 there's a lot of different properties, but -- yeah. In
16 other words, why shouldn't Mr. Constantine's money
17 judgment forfeiture be limited. You know, the global
18 settlement fund and Eufora are obviously different
19 because he was centrally involved in those, but as it
20 relates to the lines of forget, which the government, I
21 think -- and I think I saw in the sentencing memo, the
22 government said in response to Mr. Constantine saying
23 that, you know, that he had nothing to do with the lines
24 of credit, and the government I think did try to point
25 out that there were some aspects of it, maybe that

Proceedings

1 touched on him, but the bottom line is that really the
2 line of credit weren't something that he was intimately
3 involved in, so why shouldn't his money judgment
4 forfeiture be limited to the global settlement fund
5 money, the Eufora money, and some portion of the Hawaii
6 money that he either received as ill-gotten gains or had
7 some, at least, reasonable foreseeability to, I don't
8 know if there was something beyond what he received
9 himself for the central loan or things like that, that he
10 would've had to have had some reasonable foreseeability
11 about but does the government understand what I am
12 asking?

13 MS. O'CONNOR: Yes, your Honor.

14 THE COURT: And it could be in the form of a
15 letter, and then I will give Mr. Talkin, you a chance to
16 respond to that, okay?

17 MR. TALKIN: Thank you.

18 THE COURT: But the government also, do you
19 want to address in writing the issue that Mr. Kenner has
20 regarding those properties or are you -- do you want to
21 address that now?

22 I mean his argument is essentially, it's a
23 little bit different because he was involved in it, but
24 his argument is that the government is not trying to
25 prove that he committed fraud in connection with Frailes,

Proceedings

1 or del Mar, the Palms, so it's disproportionate to say
2 because there may have been one portion of a line of
3 credit that went in there, a couple of hundred thousand
4 dollars, that \$10 million should then be part of the
5 money judgment against him under those types of
6 circumstances.

7 MS. O'CONNOR: We'll address that in writing as
8 well, your Honor.

9 THE COURT: Okay. Are there any other issues
10 -- and Mr. Kenner, I will give you a chance to respond to
11 that, okay? You did raise that. I read in the letter
12 this morning where you raised that precise issue. I
13 don't remember what date --

14 DEFENDANT KENNER: Yes, your Honor.

15 THE COURT: -- it was on probably multiple
16 dates but I will let you address it further once you get
17 that, okay?

18 DEFENDANT KENNER: Thank you, sir.

19 THE COURT: And if the government is part of
20 that, the government is going to propose some alternative
21 money judgment amount for either of them. I would be
22 helpful to sort of break it out in that letter if you
23 decide based upon my questions, and what I am asking you
24 want to revise with the amount of the money judgment, I'm
25 asking that you try to do that in the letter, okay?

Proceedings

1 MS. O'CONNOR: Yes, your Honor.

2 THE COURT: All right. Anything else on the
3 forfeiture? All right. So before we get to the
4 sentencing issues I want to talk about today, I did want
5 to address the ongoing text issues. You wrote the letter
6 to the Court in late November, and I guess found the
7 discovery that you think, so that you --

8 MR. TALKIN: Yeah.

9 THE COURT: -- can you just --

10 MR. TALKIN: I'll summarize the steps.

11 THE COURT: Yeah.

12 MR. TALKIN: Your Honor, had asked us -- the
13 parties to check the files and see what we had, and I
14 went through the files that I had in my office, which is
15 some 20 boxes, maybe more. I didn't find anything, but
16 Mr. Constantine was able to find the items I described in
17 detail in the November 27th letter.

18 It seems that those are exactly what was turned
19 over with the discovery letters that I don't think
20 there's any dispute cover the disclosures that are in
21 question here.

22 The practical problem is is mostly the thumb
23 drive that was given -- that went with the February 20th,
24 2015 letter, contains -- it appears to be over a million
25 pages of documents, and it raises one practical issue,

Proceedings

1 and one real issue. The practical issue is how in the
2 world do we review all those to figure out if the text
3 messages are in there.

4 The --

5 THE COURT: You can't search it.

6 MR. TALKIN: You can but it is going to take --
7 right. No, well, I would have to get everyone
8 relativity --

9 THE COURT: No, no, I meant search by word.
10 Like you can't word search it or you can?

11 MR. TALKIN: Right. No, you can't. What --
12 they are all PDFs and the PDFs have PDFs that have PDFs
13 that have PDFs, to give you an idea of what's going on
14 there.

15 So I think that putting it into relativity or a
16 similar program would certainly then enable us to do
17 searching, but of course that's an expense, and that also
18 takes a long time.

19 The other problem is this, and I -- and your
20 Honor, I -- you have been very, very patient with me with
21 this ineffective assistance of counsel issue, and you've
22 made your ruling, but what this has raised for me, and
23 I'm obligated to bring to the Court's attention is,
24 arguably three months -- less than three months prior to
25 trial, the government dumped on the defense over a

Proceedings

1 million documents. A preliminary review of those
2 documents show that there's a bunch that are relevant
3 that could have and should have been used at trial.

4 Now I don't know, I mean I would probably have
5 to interview trial counsel, or the Court would, but I
6 don't know that they were ever reviewed, but I can
7 certainly say anecdotally from my experience, if I am
8 given a million documents, three months before trial, I
9 am going to write a letter to the Court asking for time
10 to figure out what's going on. And that, I am certain
11 did not happen.

12 I'm not at this point asking to reopen that
13 issue but I think I know, it's my obligation to follow
14 that issue to the end because if it does indicate further
15 ineffective assistance of counsel, it's something that I
16 have to raise, especially your Honor, it seems that some
17 of the documents just from preliminary review are things
18 I would've used on cross-examination.

19 So I'm not saying that I know that for sure,
20 and I don't want to give that impression. It's a very
21 preliminary review, but that's just a secondary, but
22 equally important issue of the thumb drive.

23 Now there's another issue, the second
24 submission which was in April 7th, which purported to be
25 the same production as happened on February 20th, I can

Proceedings

1 tell you even from somebody who knows little or nothing
2 about computers or terabytes, there's no way they're the
3 same.

4 The second comes on one disc, and does not
5 contain in any -- there may be some overlap, but doesn't
6 contain the documents that are in the first disclosure of
7 February 20th. And importantly, the second disclosure on
8 April 7th, 2015, does have the text messages -- does have
9 text messages but they are not the text messages we're
10 talking about. And it's those text messages that are in
11 the April 7th, 2015, which have caused great confusion in
12 this case of what we're talking about, which has been a
13 recurring theme in this case because of the overwhelming
14 amount of documents, and some that are similar and
15 overlap.

16 But that's an important issue here because
17 there were text messages talked about during the trial,
18 and shown, and put into evidence. However, the ones
19 we're talking about are not them.

20 And the final practical problem is the only
21 reason we found out about this was from Mr. Kenner's
22 filings. Mr. Kenner had a two terabyte, according to my
23 discussions with him, and what he said in court, had a
24 two terabyte hard drive, which is a large one, and that's
25 where they came from. That's something, and I am not --

Proceedings

1 whether we were entitled to that when he got it, probably
2 not, because it had to go through a taint team, and all
3 of those gyrations, but ultimately after the taint
4 examination was done, we never got that two terabyte.

5 And to make things even more muddled for your
6 Honor, that two terabyte hard drive has disappeared
7 because of the conditions Mr. Kenner is enduring at the
8 MDC. So I don't know that we're ever going to have the
9 opportunity to review what Mr. Kenner had. So I'm trying
10 to piece all of this together but that's what caused the
11 letter because there is -- you know, it would take not an
12 army but more than just my office to handle this.

13 THE COURT: Let me just ask the government, if
14 you agree with his recitation of what was on each one,
15 and whether there is differences between the productions.
16 I don't know if you can address that.

17 MS. KOMATIREDDY: Yes, your Honor, and I
18 appreciate the opportunity to address this. I know we
19 discussed this briefly at the last court conference, and
20 since that time I had spent some extensive time reviewing
21 the record on this and I would like an opportunity to
22 just explain how we got here.

23 THE COURT: Okay.

24 MS. KOMATIREDDY: First of all, with respect to
25 the specific items that Mr. Talkin's client has found

Proceedings

1 that are now in Mr. Talkin's possession, the government
2 has not yet had had an opportunity to view those himself
3 -- ourselves, and I think it is a best -- would be a best
4 practice to copy them before having us also view them.

5 But putting that aside for a moment, first I
6 understand that this is frustrating in that in the
7 ordinary course with every discovery production, it is
8 our best practice to keep a copy, a physical copy, an
9 electronic copy, and to review the contents of the
10 production before turning it over.

11 And normally, answering this question of
12 whether something was turned over should be easy by just
13 looking at that copy, and it's frustrating not to be able
14 to do that here.

15 I just want to make clear why we are in this
16 position. One is that this particular production was not
17 the normal sort of documentary production. It was an
18 electronic production that had to go through privilege
19 review, and so the prosecution team was walled off from
20 putting that production together. Myself, and Mr.
21 Miskiewicz simply were not involved.

22 Second, when it was turned over, the filter
23 team turned that production over -- the same thing over
24 to us, the prosecution team, as well as Constantine. So
25 whatever we had, I'm confident that Mr. Constantine had.

Proceedings

1 Our own review of that production was limited because as
2 the Court will recall, at the same time, Mr. Kenner had
3 brought a Fourth Amendment challenge against the
4 prosecution team for continuing to search his computer.

5 He alleged that that was a violation of his
6 rights, and he asked us not only to stop our search but
7 to purge any files that we had not culled for us as
8 exhibits at trial. In resolving that motion, we argued
9 that we should be able to continue review for some
10 limited time period. We did continue to review for some
11 limited time period, and then we represented to the Court
12 that we would stop our search, which is what we did.

13 And as part of that search, I recall, I
14 remember that many of the documents from those electronic
15 devices were redundant and cumulative of documents that
16 had already been turned over in discovery because the
17 history of this case shows that the same frauds, the same
18 losses, have been litigated multiple times, and
19 investigated multiple times in civil litigation, and SEC
20 litigation. And so many of the documents on Mr. Kenner's
21 computer and phone and been previously disclosed in those
22 litigations, and we had already disclosed that
23 documentation in discovery.

24 All of that documentation in discovery. All of
25 that is to say when it came time for trial, the

Proceedings

1 government did not mark very many exhibits from the
2 electronic devices -- very many of those documents as
3 exhibits, and we did not use any of those text messages
4 at trial affirmatively against the defense. Those are
5 not part of the production that we culled.

6 But I have reviewed the trial record in detail,
7 and I can tell you affirmatively that Mr. Constantine's
8 trial counsel did. Constantine Exhibit 326 is one of the
9 text messages that we are talking about. I can hand this
10 up to the Court, if the Court would like it. And that I
11 am handing to the defense.

12 DEFENDANT KENNER: If I could see a copy too,
13 your Honor, please.

14 MS. KOMATIREDDY: But just to be clear, this is
15 -- there should be no confusion. There were two types of
16 text messages used at trial; one was the bubble text
17 messages that were screenshots from Mr. Kenner's
18 computer, and two were the plain text messages that were
19 extracted from Mr. Kenner's phone. Both were used at
20 trial, both were discussed at trial. And in fact, the
21 trial transcript has a lengthy discussion from Mr. Kenner
22 testifying on the stand about how these were turned over
23 in discovery, more than a dozen of this type of text
24 messages, the plain text text message from Mr. Kenner's
25 phone were admitted as trial exhibits, and Mr.

Proceedings

1 Constantine's counsel admitted one of them, and cross-
2 examined using it.

3 All of this is to say even though I cannot
4 affirmatively tell you that I saw with my own eyes that
5 the text messages were turned over in discovery, I had
6 every reason to believe based on the trial record, and
7 the record set forth in the discovery letters that those
8 text messages were available to Mr. Constantine. They
9 were -- you know, as Mr. Kenner's testimony, and the
10 trial transcript shows, they were on his computer that
11 was sitting at defense table throughout the trial, a
12 trial in which both defendants conferred extensively, and
13 they were used by defense counsel which means defense
14 counsel -- this is not evidence that was suppressed by
15 the government. Defense counsel was fully on notice that
16 it existed, not once did defense counsel, either defense
17 counsel raise any possibility that they had not been
18 disclosed.

19 And for those reasons, we think that this should
20 really resolve the question of whether there was any
21 issue. There's really no basis to question whether
22 they're turned over when both defense attorneys were
23 using the text messages at trial.

24 THE COURT: Well --

25 MS. KOMATIREDDY: Furthermore --

Proceedings

1 THE COURT: Go ahead.

2 MS. KOMATIREDDY: I'm sorry, your Honor.

3 THE COURT: No.

4 MS. KOMATIREDDY: Just one more point which is
5 since trial, of course these text messages have been
6 coded in every filing essentially, and every round of
7 motion practice, and so they -- our position is they've
8 been fully litigated. Everything that could be helpful
9 to the defense has been submitted to the Court. Mr.
10 Kenner's first Rule 33 motion had an appendix with issues
11 by witness, which ran hundreds of pages, and in each of
12 those witness reports, Mr. Kenner included copies of text
13 messages from those witnesses that he felt were
14 impeaching as to their testimony. The Court already
15 reviewed all of those, and rejected them as a basis to
16 undermine the verdict in this case.

17 With that record, we feel that there need not
18 be a further investigation at least on the part of the
19 government about whether these text messages were
20 available to the defense. Any kind of claim of this sort
21 is really -- it's the defense's burden to make.

22 And so if -- we defer to the Court as to
23 whether to provide the defense with more resources to do
24 their research but we don't think this is a reason to
25 delay sentencing in this case.

Proceedings

1 THE COURT: Let me just ask you a couple of --
2 that was helpful but I guess this last point that Mr.
3 Talkin raised, which isn't inconsistent with everything
4 you've said which I fully agree with, it's obvious there
5 were text messages that were available, and were used
6 during the trial, but he is suggesting that what --
7 potentially what happened -- what may have happened, and
8 maybe I will let Mr. Kenner speak to this as well, is
9 that Mr. Kenner may have had his two terabyte hard drive,
10 and Mr. Talkin is suggesting that what prior counsel may
11 have received in this April 17th production, this
12 February 20th production, might have been some subset of
13 that. Is that -- yes?

14 MR. TALKIN: At the most, yes.

15 THE COURT: So is that something that the
16 government can speak to? Is that a possibility that -- I
17 mean, you're pointing out that, you know, he introduced
18 one text message and Mr. Kenner obviously had a lot of
19 text messages but is there a possibility that Mr. Kenner
20 got more than Mr. Constantine, I guess?

21 MS. KOMATIREDDY: Your Honor, that is a
22 possibility. That makes sense to me that it would be a
23 possibility because the phone -- the reason it would be a
24 subset, and to be clear, that same subset would be what
25 the prosecution team had. We had the exact same thing.

Proceedings

1 So the filter team and Mr. Kenner would've had
2 the full two terabytes, and the prosecution team and Mr.
3 Constantine had the post-filter subset.

4 I believe based again on the trial record, that
5 at least some portion of that phone would've had
6 privileged communications, and I say that because in the
7 trial transcript, you see that Mr. Kenner discusses a
8 text message sent to him by Mr. Stolper, who was an
9 attorney in this case. And so it would not surprise me
10 if there was a subset but that doesn't mean it's
11 improper.

12 And I am happy -- I know this is a lot of
13 information, your Honor, I am happy to write this in a
14 letter, and put it in a brief for the Court as well, to
15 make a record.

16 THE COURT: Yeah. Well, part of what I have
17 been doing all along is to the extent they've come up,
18 I've looked at them to see whether or not I thought if
19 they had been introduced, whether they would have made a
20 difference, given what was already introduced. So I've
21 done that to the best that I can up to this point.

22 But it's always helpful to know, and now that I
23 am on the Court of Appeals, I know that they would -- to
24 the extent that this is appealed later, they would like
25 to know in the first instance, was there a failure to

Proceedings

1 produce at all because that could be a threshold question
2 independent of whether or not if there was a failure to
3 produce, whether that had any impact, or whether there
4 was ineffective assistance of counsel claim -- you don't
5 know whether there's an ineffective assistance of counsel
6 claim, once you know whether it's produced or not.

7 So I understand that the Court has looked at
8 what Mr. Kenner has submitted in terms of texts that
9 weren't introduced, and made some rulings on that, but at
10 least Mr. Talkin's also suggesting there's more but --

11 MR. TALKIN: I think the -- and (indiscernible)
12 wouldn't know this but the -- this exhibit she just
13 pointed out actually proves our point. This was
14 generated by Mr. Kenner off his computer during trial,
15 and given to the trial counsel who didn't know where it
16 came from at the time, and used it on the fly as trial --
17 you know, as happens during trial. So I think it clearly
18 shows that, you know, this subset discussion is very
19 relevant.

20 THE COURT: Let me ask Mr. Kenner that. Is
21 that -- you're not -- you believe you've got a complete
22 set of the text messages, is that accurate, when you got
23 the hard drive copy of your computer?

24 DEFENDANT KENNER: I don't believe my set was
25 complete, and I have to go based on recollection because

Proceedings

1 it was a one terabyte drive, your Honor, by the way. I
2 believe they said that they delivered in one of their
3 letters two terabyte drives but I only ever had one
4 terabyte drive. And that's the one -- that's the one
5 that we --

6 THE COURT: I know. What makes you think what
7 you have is incomplete? Why do you think yours was
8 incomplete?

9 DEFENDANT KENNER: Because there were --

10 THE COURT: You were introducing text messages
11 all over the place, right?

12 DEFENDANT KENNER: Yes, sir. That is correct.

13 THE COURT: Okay.

14 DEFENDANT KENNER: What we did recover, there
15 were 89,000 text messages plus or minus, but there big
16 gaps in the -- in the data that I had. So there might've
17 been a six-month gap where there were no sent messages
18 which was clearly not possible, considering the volume of
19 my text.

20 THE COURT: Yeah.

21 DEFENDANT KENNER: So that being said, that I
22 don't have a comment on, but what Mr. Talkin just
23 referenced was, in fact, the case that after direct
24 examination, I believe it was at 5 -- transcript page
25 5042. Mr. LaRusso had cross-examined me with this

Proceedings

1 because my trial counsel failed to introduce this in
2 contradiction to some of Mr. Peca's testimony. So I had
3 printed it out, and handed it to them from that joint
4 printer that we were using at trial.

5 THE COURT: Does the government have --

6 DEFENDANT KENNER: But I --

7 THE COURT: -- a copy of the -- of what Mr.
8 Kenner -- I mean, not you, maybe the other -- the taint
9 team has a copy of what was produced to him, or they
10 don't have that.

11 MS. KOMATIREDDY: You know, your Honor, that
12 would've been created by -- I can ask FEI Cart (ph.) if
13 they have a record -- that would've been a complete copy
14 of the original evidence, what would've gone over to Mr.
15 Kenner because it was one of the first productions in the
16 case, and it was simply the seized devices copied and
17 turned over since they were seized from him.

18 I can look for a particular record in their
19 computer system that might reflect that.

20 THE COURT: All right. That might be helpful.
21 And then on Mr. Talkin's point, I am not inclined to
22 authorize the resources necessary to do this at this
23 point in this case, of having someone manually go through
24 these records. It would delay the sentencing forever,
25 and would be a lot of money.

Proceedings

1 But let me just ask the government, if they
2 produced back to you these -- the February 20th, and
3 April 7th productions, is there anyway the government
4 could, without doing it manually, figure out whether some
5 of these text messages they're saying they never had
6 would be in those productions, or the government couldn't
7 do that either?

8 MS. KOMATIREDDY: Your Honor, I think we're
9 probably operating under the same technical limitations
10 which is that the format that the privilege review
11 occurred in was this PDF format, and so Mr. Kenner had it
12 in a more easily manipulative format.

13 This also actually is discussed with the Court
14 in one of the sidebars during trial. I was reminded of
15 this as when I was going through the transcript
16 because we too, when this was produced at trial, sort of
17 faced the same issue.

18 So unfortunately, I think we would face the
19 same difficulties that Mr. Talkin would in terms of
20 trying to put it on some sort of database and going
21 through it.

22 THE COURT: Okay. I'm not --

23

24 MS. KOMATIREDDY: And of course, we would also
25 seek the Court's blessing to do that as a prosecution

Proceedings

1 team because we expect that Mr. Kenner's Fourth Amendment
2 challenge will be renewed on appeal, that we should --
3 you know, his position was that we shouldn't have any of
4 this data beyond what was used at trial anymore at all.
5 That we should purge anything that we're not actually
6 using. This was at a time when the Ginias (ph.) case had
7 been decided at the panel level, but not vacated en banc.
8 That Mr. Kenner's challenge was that our review should
9 end at anything that we had not culled out should be
10 purged.

11 So if the Court were to ask us to conduct such
12 a search, we would just ask for the Court's blessing that
13 we are able to do that, consistent with the Fourth
14 Amendment.

15 THE COURT: Yeah. Well, if you're telling me
16 you can't do that search, I mean, without doing it
17 manually, the only benefit would be is if the government
18 had some type of technological way to do some type of
19 word search of those productions, but you don't think
20 that's --

21 MS. KOMATIREDDY: I don't think so, your Honor.

22 THE COURT: All right.

23 MS. KOMATIREDDY: We're facing the same issue.

24 THE COURT: And we already know that they're in
25 Mr. Kenner's -- we know that they're in -- right, isn't

Proceedings

1 that how -- the ones that you had found --

2 MR. TALKIN: In other words, they had -- the
3 only way I would know they even exist is that they were
4 produced by Mr. Kenner which means at some point he had
5 them.

6 THE COURT: Right. But the ones you've given to
7 the Court now, you've gotten all of them from Mr. Kenner
8 essentially?

9 MR. TALKIN: Yeah, I've gotten them out of
10 public filings from Mr. Kenner. In other words, my real
11 concern is there's a whole treasure trove here. You
12 know, and it's not -- based on the few that I have seen
13 that are -- that clearly, whether they -- you know,
14 whether the -- your Honor decides -- has decided or will
15 decide they would turn over a case or not. They're
16 clearly tend to (indiscernible) the defendant, and as
17 those pile up, the effect piles up.

18 So you know that's what really concerns me
19 here. If there's ten emails that contradict Peca and he
20 had to -- excuse me, ten text messages that contradict
21 Peca, and he would've had to have been under cross-
22 examination of ten that clearly contradicted everything
23 he said, we all know what the result of that would've
24 been.

25 THE COURT: Yeah. Although, I mean some of the

Proceedings

1 ones you say clearly contradict, I think -- I don't agree
2 with that, they don't clearly contradict.

3 MR. TALKIN: We can --

4 THE COURT: They could be consistent with his
5 testimony, is --

6 MR. TALKIN: I --

7 THE COURT: Are there other ones that you
8 haven't put before me already that that are --

9 MR. TALKIN: There - I believe you have what I
10 have so far.

11 THE COURT: All right. Did you give me anymore
12 after I made the ruling with respect to this issue or
13 have there been any since then or --

14 MR. TALKIN: Yeah. I think I put in a
15 supplemental filing.

16 THE COURT: After my opinion?

17 MR. TALKIN: Before.

18 THE COURT: All right. I will go back and look
19 at it again, okay?

20 MR. TALKIN: Your Honor, there is some
21 technology available from Adobe that makes this manual
22 search faster but it's still a manual search. It makes
23 it much faster. In other words instead of -- you don't
24 have to click on each PDF. You can actually look at a
25 screen of multiple PDFs, and you can tell whether or not

Proceedings

1 text messages or not, and move on. That's my
2 understanding, just so you have that information, as
3 well.

4 THE COURT: Well, it may be if -- maybe this
5 because was -- was it 89,000, is that what you said?

6 DEFENDANT KENNER: Yes, sir.

7 THE COURT: Is till a lot less than a million
8 or millions of documents, right?

9 MR. TALKIN: Right, but there's two issues
10 here. There's the 89,000 text messages which I am saying
11 I believe there's Brady material.

12 THE COURT: Right.

13 MR. TALKIN: I have reason to believe. Then
14 you have the other -- the balance to the million
15 documents, are the ones that concern me for ineffective
16 assistance of counsel, which again I believe I've got to
17 look at.

18 THE COURT: Yeah, as I said with respect to
19 that, I am not going to hold up the case. Obviously
20 those can be brought on collateral review to the extent
21 you find anything, but we're not going to leave this
22 case, especially where we're at, hoping so that you can
23 review everything that's ever been produced, so --

24 MR. TALKIN: Your Honor, I am going to abide by
25 whatever the Court rules, but I feel that this is

Proceedings

1 something --

2 THE COURT: But --

3 MR. TALKIN: -- that you need -- that the Court
4 needs to know before we proceed.

5 THE COURT: All right. No, I appreciate that.
6 If the government could check with the cart, on the ones
7 that you believe you may not have gotten, they're saying
8 that some of them may have been privileged, and the
9 reason -- that's the reason you didn't get them is that
10 you don't believe that that's the case, that there was a
11 reason you didn't get them?

12 MR. TALKIN: No, I don't believe that there --
13 I don't know what their reasoning was, and it could
14 simply be a mess up, it could be a technological problem,
15 there could be anything, but the end result is there's
16 multiple nonprivileged communications that we're entitled
17 to that are out there.

18 THE COURT: Yeah, some may be with a lawyer,
19 but it sounds like they're talking about ones with Peca.
20 There will be no privilege.

21 MR. TALKIN: Right, people had testified --

22 THE COURT: Right.

23 MR. TALKIN: -- and to the extent that these
24 lawyers testified, they clearly -- that there's a waiver
25 of any privilege, so they've already testified in court

Proceedings

1 about their communication. so other communications
2 regarding their communications can't be privileged.

3 THE COURT: All right. If the government could
4 submit to me, file a letter, just after you speak to the
5 Cart team, I guess one of the possibilities would be with
6 respect to the 89,000 text messages that exist, whether
7 there's a way to isolate them from the original --

8 MR. TALKIN: Well, just thinking out loud, one
9 thing we do know is, and Mr. Kenner can correct me if I
10 am wrong, they're from the phone. So we can cut out the
11 whole computer aspect of these giga -- of this. so now
12 we can focus just on the phone, which I think narrows it
13 right there.

14 THE COURT: Well, was one of these productions
15 just to the phone, or that --

16 MR. TALKIN: No, I think that the text messages
17 -- no, it was both, right.

18 THE COURT: But the problem may be there may be
19 ones -- again, this went to a taint team, so you're not
20 entitled -- I can't say to the government give Mr. Talkin
21 all 89,000, so that's a problem. 2

22 MR. TALKIN: Yes, it is. I agree.

23 THE COURT: Okay. I don't know. The
24 government's going to have to help me figure out the best
25 way to deal with this. I can't think of an easy way that

Proceedings

1 -- obviously, they're focused on the text messages.
2 They're raising an issue with respect to everything but
3 the Court's focused on the text messages, trying to
4 figure out if the government can determine what text
5 messages Mr. Constantine received, and what he may not
6 have received from the 89,000. I don't know if you're
7 able to do that or not.

8 MS. KOMATIREDDY: Your Honor, I will file a
9 follow-up letter --

10 THE COURT: Okay.

11 MS. KOMATIREDDY: -- of what we've discussed
12 and attempt to propose a way forward.

13 THE COURT: All right.

14 MR. TALKIN: Your Honor, just one last thing,
15 would it make sense -- there was really two applications
16 in that letter for funding, maybe it would make sense, at
17 least, and I don't think this would be too expensive,
18 it's more just having the equipment that I do at least
19 make the copies of what I got, so I can give those to the
20 government, so they can use those to work off.

21 THE COURT: When you say the copies, you say
22 the February 20th, and the --

23 MR. TALKIN: Right, in other words, either the
24 thumb drive from February 20, and the disc.

25 THE COURT: Yes, yes.

Proceedings

1 MR. TALKIN: I will get them that ASAP --

2 THE COURT: Yes.

3 MR. TALKIN: -- so at least you'll be working
4 with the --

5 THE COURT: Yeah, that's granted, okay?

6 MR. TALKIN: Okay.

7 THE COURT: All right. I think we've done all
8 we can on that today. Just to turn to the -- as you know
9 from my notification to you, I was just trying to -- you
10 know, I've begun in addition to finalizing the
11 forfeiture, have -- and I did issue the opinion with
12 respect to Mr. Kenner's supplemental motion, I assume you
13 had a copy of that Mr. Kenner?

14 DEFENDANT KENNER: Yes, sir.

15 THE COURT: All right. So I have begun to
16 focus on the objections and the rulings on the
17 objections, so I wanted to give you all an opportunity
18 today, if there's anything you want to supplement orally
19 to what you've given me. I did want to address the loss
20 amount issue is something that I'm focused on. The
21 government addressed in its sentencing memo, so let me
22 just turn to that for a minute.

23 It seemed like the government is suggesting
24 because there have been requests for FATICO hearings on
25 some of the other alleged frauds or potential frauds,

Proceedings

1 that the government was going to, for purposes of
2 sentencing, in terms of the loss amount, not pursue, the
3 things in paragraph 29 -- and excuse me, paragraph 29 is
4 I think is what's left. Paragraph 29 -- let me just pull
5 it out. Right.

6 So paragraph 29 of I guess Kenner, I don't know
7 if it's the same number in Constantine, let me find it,
8 it's paragraph 31 in Constantine, it's the PSR now,
9 attempts to catalogue the loss amounts for purposes of
10 the charge schemes of the trial. It comes up with a \$13
11 million-and-change amount.

12 So the government never said like we think you
13 should use for purposes of the sentencing as the loss
14 amount. Is that what the government is asserting?

15 MS. KOMATIREDDY: Yes, your Honor. That's
16 right. We went through the math again and determined
17 that we fall in the range of --

18 THE COURT: Two levels lower.

19 MS. KOMATIREDDY: -- greater than 9.5 million.

20 THE COURT: Right.

21 MS. KOMATIREDDY: At the 20 --

22 THE COURT: Right.

23 MS. KOMATIREDDY: -- point enhancement.

24 THE COURT: Rather than a 22, a 20.

25 MS. KOMATIREDDY: Yes, your Honor. And in that

Proceedings

1 case, we all -- and I believe Mr. Talkin came to the same
2 conclusion in his letter, so we agree with him.

3 THE COURT: All right. And then on the issue
4 that's been raised by Mr. Kenner, and Mr. Constantine may
5 have raised it as well, but to the extent that there is
6 some value of the investments of the diverted money that
7 went to Mexico, can you explain to me why that would
8 potentially lower that amount in terms of like the actual
9 loss amount?

10 MS. KOMATIREDDY: Yes, your Honor. Well, I
11 think it -- there are two aspects of significance there,
12 one is how does it affect loss, and two, how does it
13 affect restitution?

14 THE COURT: Right.

15 MS. KOMATIREDDY: But loss -- it doesn't affect
16 loss at all because the test under the guidelines is
17 intended loss, and fraud is as soon as the money is
18 diverted from its intended purpose, the fraud is
19 complete. So our position is that the entirety of the
20 money, even if it's -- whether it's diverted to some
21 profitable enterprise or not, and whether it results in
22 some asset or not, has been fraudulently taken, and
23 therefore all of it should count against the loss amount.
24 After --

25 THE COURT: Because it's intended loss?

Proceedings

1 MS. KOMATIREDDY: Yes, your Honor.

2 THE COURT: Okay. And then on restitution?

3 MS. KOMATIREDDY: On restitution, your Honor,
4 the -- here, the -- it's a little bit more tricky but we
5 don't credit Mr. Kenner for the -- any sort of assets in
6 Mexico because as a matter of process with restitution,
7 first the Court must determine the loss, and the burden
8 is on the government to establish the victim's loss, and
9 then second, determine any offsets for value actually
10 received by the victim, and the burden is on the
11 defendant for showing that they have actually received
12 money.

13 And the issue here is threefold; one, Mr.
14 Kenner has not established that the monies -- excuse me,
15 the shares in CSL were actually in compensation for money
16 that the victims sent for Hawaii. Remember that many of
17 these victims also separately invested in Mexico, and
18 these shares in CSL were gained from some sort of
19 negotiated settlement with Mr. Jowdy. There's no
20 evidence in the record that the settlement actually had
21 to do with diverted money from Hawaii, or an attempt to
22 compensate for Hawaii. It could easily just be some sort
23 of --

24 THE COURT: Other money.

25 MS. KOMATIREDDY: -- separate side deal for the

Proceedings

1 Mexico frauds which were uncharged frauds. So that's one
2 issue that has not been established.

3 Second, Mr. Kenner's own forensic accountant
4 repeatedly states that he cannot confirm the interest.
5 So that's -- there's not actually -- we don't believe Mr.
6 Kenner has met his burden of showing the existence that
7 the victims have, in fact, an interest in an asset that
8 is going to be enforceable that is actually going to
9 result in some sort of value for them.

10 And third, given the ongoing litigation about
11 the value of the resort, there is no evidence that there
12 is any value there. So given that -- all that
13 speculation and lack of evidence, Mr. Kenner hasn't met
14 his burden of establishing an offset.

15 Now the way restitution works is that it's --
16 again, it's a process. So if he is able to establish
17 that in the future, if after forfeiture there are, in
18 fact, shares that the victims have that they sell, Mr.
19 Kenner can make an application to the Court and ask that
20 his restitution order be modified, and reduced
21 accordingly, and that's a separate application. He
22 certainly has the right to do that, and could entertain
23 it then.

24 At this point, there's just not enough evidence
25 for that. So at this point, we would suggest that the

Proceedings

1 Court institute -- impose restitution as we have proposed
2 for the counts of conviction, minus value actually
3 received, which we have measured -- we have acknowledged
4 that there were certain settlements with Northern Trust
5 Bank, and that there were some payments back from Lehman,
6 and we reduced those in our proposed amounts.

7 And to the extent that there's any other value
8 received by the victims in the future, that can be the
9 subject of future applications.

10 MR. TALKIN: Your Honor, I just think that -- I
11 just need to clear something up on loss amount, as far as
12 Mr. Constantine is concerned because we were talking
13 about a discussion in light of their concession that
14 they're not going to ask for loss on the uncharged or
15 unproven crimes.

16 In our -- the most recent sentencing
17 submission, that's September 25 of 2019, the agreement
18 that we have -- the extent that we agreed -- the extent
19 that we agreed with the government was that the loss
20 enhancement should be plus 20 at the most, and that's a
21 significant at the most, because we've made many prior
22 objections as to how we even get to 20 but the point made
23 in our letter is even if your Honor were to accept their
24 arguments, it's still two points less than the PSR.

25 We are not agreeing to that amount, and

Proceedings

1 actually the amount we -- we had at it at 11-526 and
2 change, as at the most amount but again, that doesn't
3 affect the guidelines. We're still above -- we're still
4 in the plus 20.

5 THE COURT: Right.

6 MR. TALKIN: I just want the record to be clear
7 on that, going -- harkening back to the letter filed by
8 Mr. Oliveras, a long time ago where there was a strenuous
9 objection to even getting to that amount.

10 THE COURT: Yes, I saw that. I read that
11 recently. All right.

12 Mr. Kenner, do you want to add anything?

13 DEFENDANT KENNER: Yes, your Honor, there's
14 several items that --

15 THE COURT: Just pull the mic closer?

16 DEFENDANT KENNER: I'm sorry, your Honor.
17 Thank you, your Honor, several items, if I may.

18 Based on paragraph 29 from the -- I think the
19 February - excuse me, the pre-sentence investigation
20 report. Many of these numbers that total up to \$13
21 million are not related to victims that the government
22 nominated in their superseding indictment, I think it's
23 ECF 214.

24 And in their recent sentencing memorandum, they
25 -- at page 30 and 31, I think it's ECF 765 at page 30 and

Proceedings

1 31, they conceded even more nonvictims in the case. So
2 there's a discrepancy between what the PSR originally
3 sought with the number of the people who are -- the
4 government doesn't even deem as victims in the case.

5 You have Mr. Don Chawer (ph.), for one, Mr.
6 Glenn Murray, second, John Kaiser (ph.), they have him
7 listed as \$200,000 as the victim. So when I went back
8 into the testimony to see what Mr. Kaiser's referencing
9 related to \$200,000, which I couldn't even recall, I saw
10 that it was \$200,000 that he had taken from two police
11 officers and his mother. It wasn't even his money. So I
12 am not sure why Mr. Kaiser was involved in that.

13 I think Mr. McKee's (ph.) \$250,000, on page 30,
14 is relative to the text messages that Mr. Talkin was
15 talking about earlier, where Mr. McKee has a full-blown
16 conversation the night of his dinner, of exactly what his
17 money is going to be used for after the dinner, but then
18 six years later, couldn't recall any of it, I think
19 during trial.

20 Nevertheless, I have on my own my most recent
21 filing, ECF 770, I put an appendix in that actually went
22 through the credits against loss charts, starting at it's
23 again, ECF 770, starting at page 53, was for the --
24 excuse me, page 53 is where it starts, and it does a
25 chart for your Honor for Hawaii, with credits against

Proceedings

1 loss. It does one for Eufora, several pages later, and
2 then one for the global settlement fund, all related to
3 prevailing case law, and the Second Circuit and how they
4 value these different propositions.

5 Now I was a little bit confused by Mr.
6 Komatiredy when she said that the forensic accountant
7 suggested that he can't corroborate that there's any
8 value or any investment in CSL properties. It's been
9 litigated in multiple jurisdictions, including the
10 Delaware Chancery Court that your Honor was involved as
11 an interested observer a few years ago, leading up to the
12 2017 settlement agreement with Mr. Jowdy.

13 I have a copy of it. I was able to acquire the
14 2017 settlement, although I know I had asked the Court
15 for a subpoena to get it. I was able to get a copy of
16 it. In there, the settlement between all of the CSL
17 members which includes the alleged victims in this case,
18 in the instant case, Mr. Jowdy is settling as an
19 individual in his capacity as a managing member of
20 Diamante del Mar, Diamante Cabo San Lucas, KAJ Holdings,
21 which is the only traceable funds from Hawaii to the Cabo
22 San Lucas project that's the \$350,000 we talked about
23 before that the government admitted on Government
24 Forfeiture 36.

25 But under related parties in the agreement for

Proceedings

1 related persons at definition 1.8, it says "For any
2 person specified in the settlement agreements means with
3 respect to such persons: (1) Any respective past,
4 present, or future, direct or indirect, parent entities'
5 affiliates, subsidiaries, controlled entities, families,
6 controlling persons, associates, investment advisors,
7 general partners, managing members, and (2) each and all
8 of their respective past, present, or future direct, or
9 indirect officers, directors, stockholders, principals,
10 managing directors, representatives, employees,
11 attorneys, fiduciaries, financial advisors, investment
12 advisors, insurers, reinsurers, consultant" --

13 THE COURT: All right. So what that --

14 DEFENDANT KENNER: -- "et cetera, including
15 limited liability companies, their associated entities,
16 and assigns." And I skipped over some more of the
17 typical --

18 THE COURT: All right. What was the amount of
19 that settlement?

20 DEFENDANT KENNER: It was 4.6 percent of the
21 Diamante Cabo San Lucas project which they entered into
22 in 2017. That was one of the reasons I asked your Honor
23 for at least an in camera review of the valuation of
24 Diamante Cabo from 2017.

25 And based on that, the Court should also note

Proceedings

1 that settlement was entered into after the government
2 entered G -- excuse me, Government Forfeiture 44 during
3 the forfeiture hearing, which was Mr. Jowdy and his
4 attorney's documentation that he had received all of
5 money that we documented as loans, and 19 of the Hawaii
6 investors at pre-trial.

7 THE COURT: All right. I don't want to get too
8 in the weeds on this for purposes of today but the bottom
9 line is for purposes of restitution, the most bottom line
10 question is we don't even know whether that's worth
11 anything at this point, right? That 4.6 percent --

12 DEFENDANT KENNER: That --

13 THE COURT: -- might be worth zero, right?

14 DEFENDANT KENNER: It may be worth zero. It
15 may be worth a multitude of dollars, but what I guess the
16 Courts should -- from my perspective, the Court should
17 assess is back in 2017, based on the individuals knowing
18 that Mr. Jowdy had received 100 percent of the Hawaii
19 loans, as we had documented, and most of them had
20 previously testified to, and all of them had participated
21 as plaintiffs in, what was the value back in 2017 when
22 they entered into that agreement because my belief is
23 that they tied their financial future for anything Mr.
24 Jowdy had controlled, the Diamante del Mar project, the
25 Diamante airplanes, the Cabo San Lucas, and the Hawaii

Proceedings

1 loans that we had given --

2 THE COURT: All right.

3 DEFENDANT KENNER: -- to Mr. Jowdy.

4 THE COURT: All right. I will go back -- I
5 want to go back, I will look at your ECF 770, you said
6 page 53?

7 DEFENDANT KENNER: Yes, 53 is where the
8 appendix begins. The Hawaii chart and explanation starts
9 on 54. The next one is the Eufora chart which starts on
10 page 66. And the global settlement fund chart begins on
11 page 69, and the associated case law from the Second
12 Circuit is also referenced on how I came to the different
13 conclusions in there.

14 THE COURT: All right. Okay. The only other
15 question --

16 DEFENDANT KENNER: I can put some of them on
17 the record if you would like, and right now I have the
18 citations, and the cases.

19 THE COURT: No, that's okay.

20 DEFENDANT KENNER: Okay.

21 THE COURT: The other thing I was going to do
22 today, and I'll be guided by counsel whether you want to
23 -- it's clear to me we're going to have to have another
24 -- one more conference before we set the sentencing, so
25 if you want to do this at the next conference, I was

Proceedings

1 going to give you a chance if you wanted to discuss some
2 of these other objections to the enhancements that -- you
3 know, the obstruction of justice, and role, and things
4 like that.

5 MR. TALKIN: I definitely do want to do that.
6 I'm happy to do that at another time, your Honor, but --

7 THE COURT: Okay.

8 MR. TALKIN: -- I think that they are -- the
9 problem is they are convoluted discussions.

10 THE COURT: Yeah, it's 3:30 and --

11 MR. TALKIN: Yeah.

12 THE COURT: -- it's partially my fault because
13 we started late, but we're going to have to have another
14 conference anyway, there's too many outstanding issues,
15 and I do want the government to give a closer look on the
16 issue of the money judgment because I am concerned about
17 the scope of it, okay?

18 So how long -- what's the government, in terms
19 of putting in the letter on that, what do you think is a
20 reasonable day.

21 MS. KOMATIREDDY: Is the 27th all right with
22 the Court, your Honor?

23 THE COURT: The 27th, you said?

24 MS. KOMATIREDDY: Yes, your Honor.

25 THE COURT: All right.

Proceedings

1 DEFENDANT KENNER: What day is that, your
2 Honor?

3 MR. TALKIN: 2-7.

4 DEFENDANT KENNER: 27th.

5 THE COURT: 27th. It will be the government's
6 supplemental submission on the money judgment and then --
7 I know that's right in the middle of the holidays but two
8 weeks from -- January 10th?

9 MR. TALKIN: That's fine, Judge.

10 THE COURT: Okay, Mr. Kenner?

11 DEFENDANT KENNER: What was that date, your
12 Honor?

13 THE COURT: They're going to put in their
14 submission on December 27th, on the money judgment, and
15 January 10th would be for you, Mr. Constantine to
16 respond, and then --

17 MS. KOMATIREDDY: Your Honor, we would ask for
18 the same time line for the letter --

19 THE COURT: Yeah.

20 MS. KOMATIREDDY: -- following up about the
21 text messages.

22 THE COURT: 27th, and then if there's anything
23 on the text messages, you want to respond the same date,
24 okay?

25 MR. TALKIN: Yes.

Proceedings

1 THE COURT: All right. I mean, I just think
2 it's a much bigger issue than two weeks but --

3 MR. TALKIN: I understand. At least we'll know
4 where we're going at that point.

5 THE COURT: Right. All right. And then let's
6 see if we can have a conference either the week of the
7 13th or the week of the 20th. Do you have any trials in
8 that period?

9 MR. TALKIN: Which week, Judge?

10 THE COURT: The week of the 13th or the week of
11 the 20th of January.

12 MR. TALKIN: The later the better, I don't have
13 a trial but I do have a major appeal due, so just --

14 THE COURT: All right. And is the government
15 available the week of the 20th? Is that --

16 MS. KOMATIREDDY: Sorry, your Honor, December
17 or January -- just January?

18 THE COURT: January.

19 MS. KOMATIREDDY: Your Honor, we're available
20 any day except Friday. I believe Monday is Martin Luther
21 King Day, your Honor.

22 THE COURT: All right. How about -- how about
23 the 22nd at 1 p.m.?

24 MR. TALKIN: That's fine for me, your Honor.

25 MS. KOMATIREDDY: Thank you, your Honor, that

Proceedings

1 works.

2 THE COURT: So what we'll do on then we'll --
3 I'll give you a chance to orally address -- we'll have a
4 subsequent discussion regarding any of these outstanding
5 issues. Obviously, money judgment issue will -- I'm
6 going to hold off on the forfeiture before I need to
7 receive those filings, so --

8 DEFENDANT KENNER: Your Honor, with respect to
9 the forfeiture, could I just raise the Court's attention
10 that my partner, one of my European partners had
11 submitted ECF 771 with respect to the Baja Ventures
12 forfeiture issue.

13 THE COURT: Okay. I will look at that again.

14 DEFENDANT KENNER: Thank you, your Honor.

15 THE COURT: All right. But I would just ask
16 the government, in light of the discussion we had about
17 the forfeiture, and the appraisal, I don't -- you said by
18 the end of January. Can you -- I don't know who is doing
19 the appraisal but whoever is doing the appraisal, you
20 could tell them we're having this conference, you know.
21 Your submission is going to -- I mean, I am sorry, the
22 defense submission is going to come in on January 10th,
23 and then we're going to have this conference. I would
24 really like to have that appraisal prior to that
25 conference, so that we can finalize the forfeiture issue,

Proceedings

1 okay?

2 MS. KOMATIREDDY: We'll convey that, your
3 Honor.

4 THE COURT: All right. Are there any other --
5 I know everybody may be frustrated that we haven't been
6 able to move forward completely but obviously these are
7 all important issues, and I think everybody is working
8 diligently to try to resolve as many as we can in a
9 thorough way, all right? So we're getting there. All
10 right?

11 Yes, Mr. Kenner?

12 DEFENDANT KENNER: Yes, your Honor. I just
13 wanted to raise that I had submitted back to the Court
14 back on October 21st, I apologize I don't know the ECF
15 number, but it was just a request for several subpoenas
16 or the equivalent assistance from the government to get
17 the 2008/2009 Ken Jowdy-Owen Nolan settlement agreement.
18 Again, that can be delivered under seal with all the
19 signed stipulations.

20 With respect to the loss and offset, just like
21 we just discussed the --

22 THE COURT: Does the government have that
23 already in its chart?

24 MS. KOMATIREDDY: No, your Honor, I am sorry.
25 Could -- what -- there's a sealed filing? I'm not sure

Proceedings

1 if I actually have it.

2 THE COURT: Which settlement is that?

3 DEFENDANT KENNER: Mr. Jowdy and Mr. Nolan had
4 settled in 2008 for again, the identical issues that the
5 rest of them settled for in 2017, nine years later.

6 THE COURT: You think the government has that
7 settlement?

8 DEFENDANT KENNER: I was just asking if we
9 could receive it somehow.

10 THE COURT: Oh, you want a subpoena for it?
11 The government is not aware of that?

12 DEFENDANT KENNER: It's docket number 756, and
13 766. Thank you, Mr. Brissenden.

14 THE COURT: And you know about that settlement
15 how?

16 DEFENDANT KENNER: We knew about it back in
17 2009 during Mr. Nolan's arbitration, when Mr. Jowdy
18 testified, and then here at trial, Mr. Juneau gave
19 testimony while represented by the same counsel, that he
20 had also settled with Mr. Jowdy back then. They received
21 a one percent stake in the property. The appraisal minus
22 the Danske Bank loan at the time made that one percent
23 transaction a \$3.25 million transaction for Mr. Nolan at
24 the time.

25 THE COURT: All right. Can the government look

Proceedings

1 into that because that would be potentially an offset.

2 MS. KOMATIREDDY: I understand, your Honor, and
3 I do remember Mr. Kenner's motions for discovery on this.
4 I don't believe we have it. This would be something
5 either in the possession of Mr. Jowdy or Mr. Nolan, and
6 the --

7 THE COURT: Yeah, he's asking for a subpoena,
8 so I would ask -- I don't know if you could contact Mr.
9 Nolan. I'm just asking whether or not if there is a
10 settlement, then I am -- you know, I am looking at your
11 chart. You don't have any offset for Mr. Nolan, but --

12 DEFENDANT KENNER: Okay.

13 THE COURT: -- depending on what it was, it
14 could be an offset. Okay?

15 DEFENDANT KENNER: The offset, your Honor,
16 would be one, two, three, four -- the fifth column on
17 page 54, the \$3.25 million offset.

18 THE COURT: Wait, page 54 of what?

19 DEFENDANT KENNER: On page 54 of ECF 770.

20 THE COURT: All right.

21 DEFENDANT KENNER: It's the fifth column,
22 minimum 2008 Jowdy settlement value.

23 THE COURT: All right.

24 DEFENDANT KENNER: And I think I -- I believe
25 that I reference Mr. Juneau's testimony.

Proceedings

1 THE COURT: I'm just asking the government to
2 look at that. You could put that in your letter to me,
3 as well. Just whether it -- there was a settlement, and
4 if -- why it can't be produced to the Court, and to Mr.
5 Kenner, and to Mr. Constantine if necessary, okay?

6 MS. KOMATIREDDY: Your Honor, we defer to the
7 Court, and of course we will follow the Court's order. I
8 would just note that the restitution statute makes clear
9 that the victims are not supposed to be ordered to
10 participate in a restitution order in any way. They're
11 not supposed to be required to do that.

12 THE COURT: What do you mean? If there is an
13 offset, if they recovered money that you're seeking \$1.6
14 million from Mr. Nolan, right? On page 31 of your
15 sentencing memo you have how much they lost.

16 MS. KOMATIREDDY: Yes.

17 THE COURT: And then you have -- right?

18 MS. KOMATIREDDY: I understand the Court's
19 point.

20 THE COURT: I assume that you -- all right. I
21 thought that you have offset those amounts to anything
22 that -- right? Or am I misunderstanding what that means.

23 MS. KOMATIREDDY: In our charts, we offset the
24 amounts against the 40,000 or so that was received from
25 Lehman, and any Northern Trust settlements. We are not

Proceedings

1 aware of a Nolan settlement. I understand the Court's
2 order to find out if there was a monetary settlement with
3 Mr. Nolan for this money, for Hawaii money, as opposed to
4 some separate Mexico money.

5 THE COURT: Right.

6 MS. KOMATIREDDY: I understand.

7 THE COURT: If it's unrelated to what the
8 government is seeking here in terms of the offense of
9 conviction, then I am not interested but if it relates to
10 the offense of conviction, we should have an offset for
11 it. Okay?

12 MS. KOMATIREDDY: Okay.

13 THE COURT: All right.

14 DEFENDANT KENNER: Your Honor, and will I be
15 able to get a copy of that agreement?

16 THE COURT: Well, let's see what they get
17 first, whether there is such an agreement, what they say
18 it states, and then we'll talk about getting a copy of
19 it, okay?

20 DEFENDANT KENNER: Okay. And on that chart,
21 you'll also see the bond interest earned from Northern
22 Trust is part of the transaction, as well as the 2015
23 testified recovery from Northern Trust Bank, totaling
24 \$1.6 million, and \$1.4 million respectively.

25 THE COURT: For --

Proceedings

1 DEFENDANT KENNER: So you --

2 THE COURT: - for who?

3 DEFENDANT KENNER: That's the total for Nolan,
4 Peca, Berard, Sedor and Rouchan (ph.), the five
5 individuals that were involved in the superseding
6 indictment that were Hawaii investors.

7 THE COURT: All right. I will go back and look
8 at it, okay?

9 DEFENDANT KENNER: Yes, sir, your Honor.

10 THE COURT: All right. Thank you very much.
11 Have a good weekend.

12 MS. KOMATIREDDY: Thank you, Judge.

13 MR. TALKIN: Thank you, Judge.

14 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 10th day of December, 2019.


Linda Ferrara

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